89-411

Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1989

JOHN C. WISTROM,

Petitioner,

v.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,

Respondent.

On Appeal To The Court Of Appeals Of Minnesota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether employment as a railroad electrician qualifies as "maritime employment" within the meaning of the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. §902(3), thereby barring relief under the Federal Employers' Liability Act, 45 U.S.C. §51-60 for injuries sustained in the course of that employment.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Order of the Minnesota Supreme Court denying review (A16) was not reported. The Opinion of the Minnesota Court of Appeals (A9-15) and the District Court below (A1-8) were also not reported.

JURISDICTION

The denial of Petitioner's petition for review was entered by the Minnesota Supreme Court on May 24, 1989 (A13). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The statute under which Respondent was granted Summary Judgment was the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901-905.

2. The statute under which Petitioner requested relief for his injuries was the Federal Employers' Liability Act 45 U.S.C. § 51-60.

STATEMENT OF THE CASE

Petitioner, John Wistrom, was permanently and severely injured, on or about March 16, 1984, in the course of his employment as an electrician with Respondent, a railroad engaged in interstate commerce. Petitioner was injured while performing electrical maintenance work on a reclaiming machine at Two Harbors, Minnesota. Respondent, Duluth, Missabe and Iron Range Railway Company, transports taconite pellets, via rail, from the Minnesota Iron Range to its Two Harbors facility. The facility utilizes a sophisticated conveyor system for unloading trains, stock piling pellets and loading vessels.

Petitioner filed a complaint in the District Court of St. Louis County, Minnesota, on January 23, 1986, pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51-60. Respondent answered denying Petitioner's right to relief under the FELA and filed a Motion for Summary Judgment. The District Court granted Respondent's Motion for Summary Judgment and entered Judgment for the Respondent on September 9, 1988 (A1-8). The Court concluded that Petitioner's sole remedy was under the Longshoremen and Harbor Workers' Compensation Act (LHWCA), finding that Petitioner's employment met both the "situs" and "status" requirements of the Act.

Petitioner concedes that his employment meets the "situs" test as outlined by the District Court's Order. However, his duties as a railroad electrician do not meet the "status" requirements of the LHWCA. Petitioner filed a timely appeal with the Minnesota Court of Appeals which affirmed the judgment of the trial court on March 28, 1989 (A9-15). Petitioner then appealed to the Minnesota Supreme Court which denied the Petition for Review on May 24, 1989 (A16).

ARGUMENT

The Federal Employers' Liability Act was established by Congress to provide the *exclusive* remedy for the injury, illness or death of railroad employees engaged in interstate or foreign commerce. 45 U.S.C. §§ 51-60; *Wabash R. Co. v. Hayes*, 234 U.S. 86 (1914). The Act was "a response to the special needs of railroad workers who are daily exposed to risks inherent in railroad work. . . .

(Citation omitted). The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense *equitably* between the worker and the carrier." *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326, 329 (1958). (Emphasis added).

In 1927, the Longshoremen and Harbor Workers' Compensation Act was enacted in an effort to fill the void created by the "inability of the states to provide adequate protection for *longshoremen* injured on navigable waters. *Director, OWCP v. Perini North River Associates,* 459 U.S. 296, 337 (1983). It provided compensation only "if recovery . . . through workmen's compensation proceedings [could] not validly be provided by state law." *Northeast Marine Terminal Company, Inc. v. Caputo,* 432 U.S. 248, 258 (1977). The 1927 Act contained a single situs requirement limiting coverage to injuries occurring upon the navigable waters of the United States. 44 Stat. 1426. Therefore, coverage of longshoremen's injuries which occurred on land were left entirely to state workmen's compensation laws. In 1972, Congress amended the LHWCA to expand coverage under the Act because state workmen's compensation laws provided inadequate benefits to *longshoremen* injured on land. *Caputo,* 432 U.S. at 263-264.

Congress did not intend that railroad worker's injuries be compensable under the LHWCA. The 1972 Amendments to the LHWCA enacted both a "situs" and "status" test for determining whether injured workers were covered by the Act. The "situs" test provides that compensation is payable only if the employee's disability "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier,

wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). However, the "status" test defines such an employee as "any person engaged in *maritime employment*, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and ship breaker." 33 U.S.C. § 902(3). (Emphasis added).

The Act does not define the term "maritime employment", but the legislative history of the 1972 Amendment and relevant case law foreclose defendant railroad's contention that Petitioner was engaged in "maritime employment". The Committee Reports indicate that Congress was primarily concerned with providing for those injured maritime employees who were not protected under State Compensation acts and were not covered by the LHWCA solely by virtue of where they were when they were injured (A53-56). Clearly these concerns were not directed at railroaders who were already provided with adequate remedies under the FELA no matter where they were injured. In fact, this Court has noted that the 1972 Amendments were aimed at those who, without the 1972 Amendments "would be covered only for *part* of their activity." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 248, 273 (1977). (Emphasis added).

> The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States'. Thus, coverage of the present Act stops at the waters edge; injuries occurring on land are covered by State

> Workmen's Compensation laws . . . The Committee believes that the compensation payable to a longshoreman or ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. H.R. Rep. No. 92-1441, at 10-11, U.S. Code Cong. & Admin. News 1972, p. 4707-4708; S. Rep. No. 92-1125, at 12-13 (A55).

Clearly, Congress did not intend coverage of the LHWCA to depend on where the injury occurred. Likewise, Congress could not have intended railroaders adequately protected under the FELA to sometimes be covered under the LHWCA depending on where the injury occurred.

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, *just because they are injured in an area adjoining navigable waters* used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees *whose jobs do not require them to participate in the loading or unloading of cargo.* (Ibid. at 10-11)(Emphasis added) (A55-56).

This Court and the Supreme Court of Virginia have concluded that the "maritime employment" status requirement of the LHWCA was established to provide workmen's compensation for "those workers on the situs who are involved in the *essential elements* of loading and unloading." *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 424, 1427 (1985) (emphasis added); *White v. Norfolk & Western Ry. Co.,* 232 S.E.2d 807 (Va. 1977), *cert. denied* 434 U.S. 860 (1978); *Schwab v. The Chesapeake & Ohio Ry. Co.,* 365 S.E.2d 742 (Va. 1988). *Cert. Granted,* 109 S.Ct. 1116 (1989).

Adhering to the "essential element" standard mandated by this Court in *Herb's Welding*, the Virginia Supreme Court noted that "Congress did not extend federal coverage to *every worker* injured [on the situs], for it added an amendment defining a covered employee as 'any person engaged in maritime employment.' " 33 U.S.C. § 902(3) (emphasis added); *Schwab v. The Chesapeake & Ohio Ry. Co.*, 365 S.E.2d 742, 744 (1988). In *Northeast Marine Terminal Co. v. Caputo*, this Court held that the 1972 Amendments were intended to cover "persons whose employment is such that they spend at least some of their time in *indisputably longshoring* operations." 432 U.S. 248, 273 (1977) (emphasis added). (Both men spent a portion of their regular working time *on vessels* and a portion on land. Without the 1972 Amendments they would have been covered for only their shipboard work). The *Caputo* Court concluded that "persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered." 432 U.S. at 268.

Petitioner, John Wistrom, is employed by the Respondent railroad as an electrician. Petitioner's function as an electrician was purely the maintenance of electrical equipment. Because Petitioner was not engaged in the actual loading, unloading, repairing or building of a vessel before, during or after the occurrence of his injury, he clearly cannot be deemed as involved in the "essential elements of loading or unloading vessels." At the time of his injury Petitioner was performing electrical maintenance on a reclaiming machine. As the District Judge noted in his Order, this piece of equipment is not traditionally maritime (A1-8). Rather his job as an electrician is indistinguishable from that done at garden variety railroad yards. "The determination of whether employee

activities constitute maritime employment is not to be left to the whim of the employer". *Texports Stevedore Co. v. Winchester,* 632 F.2d 504, 511 (1980).

CONCLUSION

The FELA was established to promote greater standards for worker's safety by providing *employees of railroads with full* compensation for injuries sustained in the performance of their duties due in whole or in part to the negligence of the railroad. 45 U.S.C. § 51. A grave inequity befalls railroaders who are denied coverage under the FELA simply because of where they happen to have performed their duties. To allow railroads to escape liability under the FELA would be contrary to the Congressional intent in enacting both the FELA and the LHWCA. As the Supreme Court in *Herb's Welding* noted, Congress did not enact the LHWCA "to cover all those who breathe salt air". 470 U.S. at 424. As Petitioner does not meet the status test for maritime employment under the Longshoreman and Harborworkers' Compensation Act, Petitioner has no remedy under this Act. The judgment entered by the trial court should be reversed and remanded with instructions that this case be tried under the Federal Employers' Liability Act.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA DISTRICT COURT – DIVISION I

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT

John Charles Wistrom,
Plaintiff,

vs.

Duluth Missabe and Iron Range Railway Company,
Defendant.

ORDER

Court File No. 8720853

(Filed Sept. 9, 1989)

The above-entitled matter came on for hearing before the undersigned, Judge of District Court, on July 14, 1988, upon defendant's motion for summary judgment or, in the alternative, for dismissal for lack of subject matter jurisdiction. D. Edward Fitzgerald appeared on behalf of defendant. Patrick S. O'Brien appeared on behalf of plaintiff.

The Court, having heard the arguments of counsel, having reviewed the memoranda and supporting documents in the file, and being fully advised in the premises, now makes the following Order:

IT IS HEREBY ORDERED:

That defendant's motion for summary judgment is granted on the ground that plaintiff's sole and exclusive remedy for the injuries alleged in his complaint is under the Longshoremen and Harbor Workers' Compensation Act.

Let the attached Memorandum be a part of this Order.

Dated: September 9th, 1988 BY THE COURT:

/s/ Jack J. Litman
Judge of District Court

MEMORANDUM

Defendant DM&IR's motion for summary judgment raises just one issue: whether plaintiff was engaged in "maritime employment" as defined in the Longshoremen and Harbor Workers' Compensation Act (LHWCA) and cases thereunder. The Court rules in the affirmative: plaintiff's employment falls within the scope of the LHWCA. The Act provides plaintiff with his sole and exclusive remedy for the injuries he alleges. The FELA suit must be dismissed.

The 1972 amendment to the LHWCA extended workers' compensation coverage to certain workers if both a "situs" test and a "status" test are met. The parties agree that the "situs" test has been satisfied in the instant case. A determination under the "status" test requires a construction of the Act's definition of "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . " 33 U.S.C. sec. 902(3). The Act should be liberally construed in favor of coverage, to avoid the harsh and incongruous results

that often followed from the former statute. *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977).

An employee is covered under the Act if he or she is involved in the integral process of loading and unloading ships. *Herb's Welding Co. v. Gray*, 470 U.S. 414, 423 (1985); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 83 (1979). The Act was not intended to cover employees who are not engaged in loading, unloading, repairing or building ships, just because they are injured in an area adjoining navigable waters. *Herb's Welding Co.* at 424. Courts have not drawn a bright line of demarcation between coverage and non-coverage which might direct this Court to readily label plaintiff's occupation.

Plaintiff John Wistrom worked as an ore dock electrician, performing electrical maintenance on the ore docks and storage equipment at defendant's shiploading and storage facility at Two Harbors. Plaintiff was allegedly injured while attempting to repair a "reclaimer," used at one of the storage areas. A reclaimer is a mobile device which moves stored taconite onto the conveyor system of the facility. Taconite pellets on the conveyor system can be transported directly to the docks and loaded onto ships. Plaintiff also worked on the ore dock itself.

It is well established that the repair and maintenance of equipment necessary to the loading and unloading of ships is integral to the process and therefore constitutes maritime employment under the LHWCA. *See-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121 (9th Cir. 1982); *Prolerized New England Co. v. Miller*, 691 F.2d 45 (1st Cir. 1982); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750 (5th Cir.

1981); *Garvey Grain Co. v. Director, OWCP,* 639 F.2d 366 (7th Cir. 1981); *Price v. Norfolk & Western Railway Co.,* 618 F.2d 1059 (4th Cir. 1980). It is essential to the traditional longshoring activity that the required machinery be properly maintained. *Price, supra.* Defendant's Two Harbors site is a large and complex shiploading facility which performs a traditional maritime function – loading ships with ore – in a modern and non-traditional manner. The equipment maintained by plaintiff, while not traditionally maritime, was indispensable to the shiploading process.

In so ruling, the Court follows the expansive view of the LHWCA taken by the federal district court for Minnesota. In a memorandum opinion which was adopted by Judge MacLaughlinl, Magistrate McNulty found that a worker who maintained a "stacker" used for loading and storing taconite was covered under the Act:

> This approach comports with the liberal interpretation afforded remedial legislation. At one time longshoremen carried cargo to the ship on their shoulders. Later, cranes and huge nets were developed. Today, electrically powered and electronically controlled conveyors are common. The maintenance and repair of this sophisticated equipment is indispensable in the movement of maritime cargo, and is no less a maritime activity than was carrying a bale from dock to hold.

Billings v. Duluth, Missabe & Iron Range Railway Company, No. 5-80-34 (D.Minn., filed August 25, 1980). *See also Marnich v. Duluth, Missabe & Iron Range Railway Co.,* No.

5-83-63 (D.Minn., filed February 3, 1984, McNulty, Magistrate); *Griff v. DM&IR*, No. 5-83-382 (D.Minn., filed September 27, 1984, Magnuson, Judge, adopting the recommendation of Magistrate McNulty, filed August 2, 1984); *Saylor v. DM&IR*, No. 5-80-67 (D.Minn., filed December 31, 1980, McNulty, Magistrate). This Court can find no material basis for distinguishing the instant case from this line of federal cases.

J.J.L.

8720853

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT

John Charles Wistrom,
Plaintiff,

vs.

Duluth, Missabe and Iron Range Railway Company,
Defendant.

JUDGMENT

(Filed September 9, 1988)

The above-entitled matter came on for hearing before the above-named Court on the 14th day of July, 1988, upon defendant's motion for summary judgment or, in the alternative, for dismissal for lack of subject matter jurisdiction. D. Edward Fitzgerald appeared on behalf of Defendant. Patrick S. O'Brien appeared on behalf of plaintiff.

The Court, having heard the arguments of counsel, having reviewed the memoranda and supporting documents in the file, and being fully advised in the premises, did on the 9th day of September, 1988, duly make and file its Order granting the defendant's motion for summary judgment on the ground that plaintiff's sole and exclusive remedy for the injuries alleged in his complaint is under the Longshoremen and Harbor Workers' Compensation Act.

Now, pursuant to said Order, Summary Judgment is hereby entered for the Defendant, Duluth, Missabe and Iron Range Railway Company.

Witness the Honorable Jack J. Litman, Judge of the District Court, at Duluth, Minnesota, this 9th day of September, 1988.

JOSEPH M. LASKY,
Court Administrator

/s/ By Nancy Odden

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF ST. LOUIS — SIXTH JUDICIAL DISTRICT

JOHN CHARLES WISTROM,
Plaintiff,

vs.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
Defendant.

NOTICE OF APPEAL TO COURT OF APPEALS

TRIAL COURT CASE NUMBER: #8720853

DATE OF JUDGMENT ENTERED: September 9, 1988

TO: Clerk of the Appellate Courts
230 State Capitol, St. Paul, MN 55155

Please take notice that the above-named plaintiff appeals to the Court of Appeals of the State of Minnesota from a judgment of the court entered on the date shown, granting defendant's Motion for Summary Judgment.

DATED: 11-14-88

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STATE OF MINNESOTA

IN COURT OF APPEALS

C1-88-2373

St. Louis County — Schultz, Judge*

John Charles Wistrom,
Appellant,

vs.

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Filed March 28, 1989
Office of Appellate Courts

SYLLABUS

A person injured while repairing machinery used in loading maritime cargo is engaged in "maritime employment" for purposes of the Federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1986).

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* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

Affirmed.

Heard, considered and decided by Randall, Presiding Judge, Kalitowski, Judge, and Schultz, Judge.

O P I N I O N

SCHULTZ, Judge

Appellant was injured while working at respondent's Two Harbors ore docks and taconite storage facility. The action was brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986). Respondent moved for summary judgment, contending appellant's sole remedy was that provided by the Longshore and Harbor Workers' Compensation Act. The trial court granted respondent's motion for summary judgment, and Wistrom has appealed.[1]

FACTS

Respondent Duluth, Missabe and Iron Range Railway Company (DM & IR) operates a taconite unloading and loading facility at Two Harbors, Minnesota. Railroad cars are brought from the Iron Range to the facility. They are then unloaded at the facility's train unloading station. Pellets are discharged onto a conveyer system which can move the pellets directly to the ore dock for immediate

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[1] This case is a companion case of *Johnson v. Duluth, Missabe and Iron Range Railway Co.*, ___ N.W.2d ___ (Minn. Ct. App. Mar. 28, 1989).

loading into the holds of vessels or to the storage area. Pellets conveyed to the storage area are placed in storage by a mechanical stacker which runs on tracks on an elevated berm. When taconite from the storage area is to be transferred onto a ship, a machine known as a bucket wheel reclaimer is used. The bucket wheel reclaimer loads the taconite either onto traveling hopper cars or onto the conveyer system of the mechanical stacker, which then conveys the taconite directly to the main conveyer system for transport to the docks and ships.

Wistrom was employed by DM & IR as an ore dock electrician at the Two Harbors facility. As an ore dock electrician, Wistrom performed electrical repair work on the ore dock and in the storage facility. Wistrom alleges he was injured while mounting the bucket wheel reclaimer to perform electrical maintenance work on the reclaimer.

Wistrom filed suit against DM & IR, alleging violations of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. DM & IR moved for summary judgment or, in the alternative, for dismissal for lack of subject matter jurisdiction. The trial court granted DM & IR's motion for summary judgment, finding appellant's sole remedy was under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (1986).

ISSUE

Was Wistrom engaged in "maritime employment" within the meaning of the LHWCA at the time of his injury?

ANALYSIS

The LHWCA provides the exclusive remedy for a harbor worker injured in the course of his employment. 33 U.S.C. § 905(A). Coverage under the LHWCA is extended to any person

> engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, ship-builder and ship-breaker.

Id. § 902(3). The personal injury damages for which recovery is provided is limited:

> [C]ompensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

Id. § 903(a). An employer is defined:

> [A]n employer, any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Id. § 902(4).

Prior to 1972, coverage under the LHWCA was determined solely by whether or not the situs of the injury was upon navigable waters of the United States. The 1972 amendments were an attempt to insure full-time LHWCA coverage for workers who were engaged in land-to-ship, ship-to-land, or ship-to-ship movement of cargo, regardless of whether or not all duties were performed on navigable waters. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979).

Under the 1972 amendments, there is a dual test, consisting of the traditional situs standard and a new employee status standard, for determining whether a worker is covered under the Act. *Id.* at 73. The parties agree that the situs standard has been met in this case. Therefore, the issue is whether the status standard is met.

The status test defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, ship-builder, and ship-breaker." 33 U.S.C. § 902(3). The term "maritime employment" embodies an occupational rather than a geographic concept. *P.C. Pfeiffer Co.*, 444 U.S. at 79. In determining whether a person is engaged in maritime employment, "the crucial factor is the nature of the activity to which a worker *may* be assigned." *Id.* at 82 (emphasis added).

In determining whether someone is engaged in "maritime employment" as that term is used in the LHWCA, it is important to keep in mind the reasons behind the 1972 amendments to the Act. One reason for the expansion of

coverage embodied in the 1972 amendments was a recognition that modern cargo-handling techniques had moved much of the longshoreman's work inland. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 262 (1977). The terms "longshoreman" and "longshoring operations" have been similarly expanded to include more on-shore persons and activities. *Id.* at 264. They include people "engaged in the handling of cargo as it moves between sea and land transportation after its immediate unloading." *Id.* at 267-68.

An occupation is maritime, within the scope of the LHWCA, if it has a reasonably significant relationship with activities which are traditionally considered maritime. *Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982); *Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs*, 644 F.2d 827, 830 (9th Cir. 1981). Repair and maintenance of machinery, equipment, and facilities used in loading and unloading maritime cargo are traditional maritime functions. *Sea-Land Services, Inc.*, 685 F.2d at 1123.

The purpose of the LHWCA is not to provide coverage for "all those who breathe salt air." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985). The Supreme Court in *Herb's Welding* held that the LHWCA did not apply to injuries sustained by a welder working on an offshore oil-drilling platform. The court has similarly recognized that the Act does not cover employees whose only responsibility is to pick up stored cargo for further trans-shipment or purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. *P.C. Pfeiffer Co.*, 444 U.S. at 79-80 (quoting Sen. Rep.

No. 1125, 13; H.R. Rep. No. 1441, 92nd Cong. 2d Sess. 11, *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4708).

Applying these principles to the present case, the trial court was correct in finding appellant's sole remedy is under the LHWCA. Appellant was engaged in the repair and maintenance of machinery used in traditional maritime activities as that term has come to be defined following the 1972 amendments to the LHWCA. Wistrom was injured while repairing or maintaining machinery used to move cargo from on-land storage to ships.

D E C I S I O N

Wistrom's exclusive remedy is that which is provided by the LHWCA.

Affirmed.

/s/ Harold W. Schultz, Jr.
March 17, 1989.

STATE OF MINNESOTA
IN SUPREME COURT
C1-88-2373

John Charles Wistrom,

Appellant,

vs.

Duluth, Missabe and Iron Range Railway Company,

Respondent.

O R D E R

(Filed May 24, 1989)

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of John Charles Wistrom for further review be, and the same is, denied.

Dated: 5-24-89

BY THE COURT:

/s/ Peter S. Popovich
Chief Justice

FEDERAL EMPLOYERS' LIABILITY ACT
45 U.S.C. § 51-60

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(Apr. 22, 1908, c. 149, § 2, 35 Stat. 65.)

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That

no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That

in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

(Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.)

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the Untied States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or

corporations charged with the duty of the management and operation of the business of a common carrier.

(Apr. 22, 1908, c. 149, § 7, 35 Stat. 66.)

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

(Apr. 22, 1908, c. 149, § 8, 35 Stat. 66.)

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

(Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291.)

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts

incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

(Apr. 22, 1908, c. 149, § 10, as added Aug. 11, 1939, c. 685, § 3, 53 Stat. 1404.)

LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT
33 U.S.C. § 901-905

§ 901. Short title

This chapter may be cited as "Longshore and Harbor Workers' Compensation Act."

(Mar. 4, 1927, c. 509, § 1, 44 Stat. 1424; Sept. 28, 1984, Pub.L. 98-426, § 27(d)(1), 98 Stat. 1654.)

§ 902. Definitions

When used in this chapter –

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include –

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel;

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

(5) The term "carrier" means any person or fund authorized under section 932 of this title to insure under this chapter and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

(13) The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue

Code of 1954 [26 U.S.C.A. § 3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" includes stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child", "grandchild", "brother", and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) of this section.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

(17) The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

(18) The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is –

(A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof,

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,

(C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the secretary,

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have

ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control from pursuing his education. A child shall not be deemed to be a student under this chapter during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(22) The singular includes the plural and the masculine includes the feminine and neuter.

(Mar. 4, 1927, c. 509, § 2, 44 Stat. 1424; June 25, 1938, c. 685, § 1, 52 Stat. 1164; Oct. 27, 1972, Pub.L. 92-576, §§ 2(a), (b), 3, 5(b), 15(c), 18(b), 20(c)(1), 86 Stat. 1251, 1253, 1262, 1263, 1265; Sept. 28, 1984, Pub.L. 98-426, §§ 2, 5(a)(2), 27(a)(1), 98 Stat. 1639, 1641, 1654.)

§ 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(d) Small vessels

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this

subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility, over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee –

(A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or

(B) if the employee is not subject to coverage under a State workers' compensation law.

(3) For purposes of this subsection, a small vessel means –

(A) a commercial barge which is under 900 lightship displacement tons; or

(B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross.

(e) Credit for benefits paid under other laws

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 or Title 46 (relating to recovery for injury to or death of seamen). shall be credited against any liability imposed by this chapter.

(Mar. 4, 1927, c. 509, § 3, 44 Stat. 1426; Oct. 27, 1972, Pub.L. 92-576, §§ 2(c), 21, 86 Stat. 1251, 1265; Sept. 28, 1984, Pub.L. 98-426, § 3, 98 Stat. 1640.)

§ 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

(Mar. 4, 1927, C. 509, § 4, 44 Stat. 1426; Sept. 28, 1984, Pub.L. 98-426, § 4(a), 98 Stat. 1641.)

§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages

from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent,

operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(c) Outer Continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this chapter by virtue of Section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

(Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426; Oct. 27, 1972, Pub.L. 92-576, § 18(a), 86 Stat. 1263; Sept. 28, 1984, Pub.L. 98-426, §§ 4(b), 5(a)(1), (b), 98 Stat. 1641.)

U.S. CODE CONG & ADMIN. NEWS 1972
LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT OF 1972
HOUSE REPORT 92-1441
SENATE REPORT 92-1125

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

P.L. 92-576, see page 1452

Senate Report (Labor and Public Welfare Committee) No. 92-1125,
Sept. 14, 1972 [To accompany S. 2318]

House Report (Education and Labor Committee) No. 92-1441,
Sept. 25, 1972 [To accompany H.R. 12006]

Cong. Record Vol. 118 (1972)

DATES OF CONSIDERATION AND PASSAGE

Senate September 14, October 14, 1972

House October 14, 1972

The House Report is set out.

HOUSE REPORT NO. 92-1441

The Committee on Education and Labor, to whom was referred the bill (H.R. 12006) to amend the Longshoremen's and Harbor Workers' Compensation Act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause and inserts a substitute text which appears in italic type in the reported bill.

Purpose and Background of Legislation

Amendments to the Longshoremen's and Harbor Workers' Compensation Act are long overdue. This Act has not been amended since 1961. In that year, the maximum benefit under the Act was set at $70 a week. Today, the average longshoreman's or ship repairman's wage is over $200 a week in some ports. In order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is needed. Although employer groups indicated their willingness to increase worker benefits, they sought a modification of a long line of Supreme Court rulings. These decisions ruled that a shipowner was liable under the doctrine of seaworthiness, for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore's employer on theories of expressed or implied warranty, thereby transferring their liability to the actual employer of the longshoremen.

It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

In considering H.R. 12006 the Committee has also given the most careful consideration to the recommendations of the National Commission on State Workmen's Compensation Laws contained in its report issued on July 31, 1972.

Committee Action

The Select Subcommittee on Labor held hearings on June 27, July 18, and July 20 on H.R. 12006 and related bills.

Testimony was presented by the Honorable James D. Hodgson, Secretary of Labor, and numerous public witnesses.

On September 19 the full Committee on Education and Labor ordered H.R. 12006 discharged from subcommittee consideration and the full Committee unanimously approved, by voice vote, and reported this legislation with bipartisan approval.

Estimate of Costs

Based on data supplied by the Department of Labor the committee submits in accordance with requirements of clause 7 of rule XIII the following table which indicates the projected cost of the benefits program to the Federal Government for its 50 percent share of the increase in benefits.

	1973	1974	1975	1976	1977
Maritime employment.....	$845,100	$474,474	$528,197	$557,212	$587,463
Employers of District of Columbia	$316,261	$1,267,628	$1,335,410	$1,401,969	$1,471,928
Total.....	$1,161,361	$1,742,102	$1,863,607	$1,959,171	$2,059,391

The Department of Labor submitted no cost estimate with respect to administrative changes made by these amendments. Because of many variables including the extent of demand for legal assistance by claimants and the cost of complying with new administrative requirements, the Committee was unable to make a firm estimate of administrative costs.

Summary of Major Provisions of the Bill

Improvement of the benefit structure

The bill improves the benefit structure of the Act in the following respects:

Maximum and minimum benefit amounts

The basic requirement of the Act is for the injured worker to receive 66⅔% of his average weekly wage. Historically this ⅔ requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. As a result of the 12 year freeze on increasing benefits under this Act the present $70 maximum results in few workers receiving ⅔ of their average weekly wages and many workers receiving as low as 30% of their average weekly wage.

Section 5 of the bill amends the Act to provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor. The expectation is that a 200% maximum will enable approximately 90% of the work force covered by this Act to receive ⅔ of their average weekly wage. In order to ease

the adjustment of these benefits which at a minimum will result in doubling the compensation payment for most covered workers, the bill provides a phase-in in four steps as follows: 125 percent or $167 whichever is greater during the period ending September 30, 1973; 150 percent during the period beginning October 1, 1973 and ending September 30, 1974; 175 percent during the period beginning October 1, 1974 and ending September 30, 1975; and 200 percent beginning October 1, 1975.

To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased as the ceiling moves to 200 percent.

The bill also requires an annual redetermination by the Secretary which will allow any increase in the national average weekly wage to be reflected by an appropriate increase in compensation payable under the Act. A similar provision for upgrading benefits in future years for cases of permanent total disability or death benefits is contained in Section 10 of the Act (Section 11 of the bill). These employees will receive annual increases based on percentage increases in the national average weekly wage.

A separate determination is provided in Section 6 of the Act for a minimum payment of 50 percent of the national average weekly wage or the employee's full average weekly wage, whichever is less. The present minimum payment of $18 is unconscionable.

A separate computation of the maximum and minimum for non-appropriated fund employees is keyed to

the GS schedule since such employees are closely related to the federal employee program.

Section 11 of the bill adds a separate provision to section 10 of the Act to increase future benefits to be paid to those people who have been receiving compensation or benefits for total disability or death at levels ranging from less than $25 a week to the $70 a week maximum. Half of these increased benefits will be paid from a special fund, financed by all covered employers, and half from federal funds.

SURVIVOR BENEFITS

Under present law, accrued benefits unpaid at the time of the beneficiary's death are paid to his survivors only in the case of scheduled awards.

Section 5(c) of the bill amends Section 8(d) of the Act to provide for payment of survivor benefits in situations where a worker who is entitled to benefits for permanent total or permanent partial disability dies from causes other than the injury. Specific provision is made for protecting immediate survivors and making sure that scheduled awards are still paid in full. A further provision is made for payment of benefits due in scheduled award cases into the special fund under Section 44 of the Act when there are no survivors.

The benefit structure for survivors is altered to provide additional benefits for widows and children, and to expand the class of dependents entitled to receive benefits or survivors. Section 9 of the Act (Section 10 of the bill) is amended to increase funeral benefits from the

present 400 dollars to a more realistic amount of 1,000 dollars. The present Act provides that a surviving wife or husband receives 35 percent of the award, and children receive 15 percent. The amended Act will provide a 50 percent award to surviving wives or husbands and $16^2/_3$ percent to the children, subject to a maximum of $66^2/_3$ percent of the average weekly wages.

A special definition of dependency is also provided in order to take care of dependents as defined in the Internal Revenue Code who would otherwise not be eligible under this Section. Their benefits are 20 percent of the award.

A minimum death benefit tied to the applicable national average weekly wage but not to exceed the employee's average weekly wage is also provided.

Calculation of Benefits

There are many cases where the disability payments for the injured employee are calculated as a percentage of average weekly wages due to the fact that the employee had not been working a full work week. It was brought to the committee's attention that these calculations are based on an assumption that the average weekly wage is to be divided into sevenths, notwithstanding the fact that the vast majority of workers covered by this Act commonly work on a five day work week basis. To the extent that the five day week worker has his weekly wage calculated on a seven day work week period he can be severely penalized by these computations. Therefore, it is the committee's expectation that in the administration of this Act due regard be given to the actual work weeks of the employees covered by this Act so that those

employees who are in a five day work week do not have their benefits reduced by seven day work week calculations.

Elimination of Unseaworthiness Remedy

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25[1] (1946) which held that the traditional

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[1] 66 S.Ct. 872, 90 L.Ed. 1099.

seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki*, case, vessels are liable, as third parties for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124[2] (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

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[2] 76 S.Ct. 232, 100 L.Ed. 133.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or

other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act. *Crumedy vs. The J. H. Fisser,* 358 U.S. 423,[3] *Albanese vs. Matts,* 382 U.S. 283,[4] *Skibinski vs. Waterman SS Corp.,* 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores vs. Ellerman Lines,* 369 U.S. 355,[5] *Blassingill vs. Waterman SS Corp.,* 336 F 2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. vs. Peterson,* 347 U.S. 396,[6] *Italia Societa vs. Oregon Stevedoring Co.,* 376 U.S. 315,[7] or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe

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[3] 79 S.Ct. 445, 3 L.Ed.2d 413.

[4] 86 S.Ct. 429, 15 L.Ed.2d 327.

[5] 82 S.Ct. 780, 7 L.Ed.2d 798.

[6] 74 S.Ct. 601, 98 L.Ed.2d 798.

[7] 84 S.Ct. 748, 11 L.Ed.2d 732.

place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation – just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman

or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410[8] (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371[9] (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was cause by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the

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[8] 83 S.Ct. 1349, 10 L.Ed.2d 448.

[9] 87 S.Ct. 1419, 18 L.Ed.2d 488.

Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupation health and safety.

Injury Following Previous Impairment

The bill amends section 8 (f) of the Act (Section 9 of the bill) in order to limit the burden on employers in so-called second injury cases. Many employers have an inaccurate impression regarding the liabilities for workmen's compensation when they employ handicapped workers. It is unfortunately a widespread belief that an employer is subjected to burdensome compensation costs where a handicapped worker receives an injury at the new place

of employment. The provision in the bill makes clear that the employer's responsibility for the subsequent or second injury is limited to the scheduled award for the second injury or 104 weeks, whichever is greater. The remaining obligation to pay that employee where he is totally or partially disabled will fall upon the special funds existing under Section 44 of the Act. This method of spreading the risk among all employers is intended by the committee to encourage the employment of handicapped workers.

Elimination of Ceiling on Temporary Disability Payments

The present law contains a maximum limitation of $24,000 exclusive of medical payments in cases of temporary total and permanent partial disability. H.R. 12006 amends Section 14 of the Act to eliminate any maximum on these types of compensation payments to avoid any injustice to injured workers who would reach this maximum payment but still be suffering from disability.

Student Benefits

The bill extends to age 23 years the limit to which surviving dependent children, of fatally injured workers, seeking a higher education may continue to receive compensation payments.

The present law limits these benefits to children up to an age of 18 years. Today children are constantly urged to continue their education as long as possible, and, with the increasing number of children continuing their education into college, the 18 years of age limit is unnecessarily restrictive. This proposal would not establish any new

concept related to workmen's compensation programs. It would if enacted, simply bring the protection of the Act into line with the other jurisdictions which have similar provisions in their programs – e.g. Hawaii, Kansas, Puerto Rico, Vermont, West Virginia, and Washington.

Legal Fees

H.R. 12006 amends section 28 of the Act to authorize assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals. Attorneys fees may only be awarded against the employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation. Attorneys fees may not be assessed against employers (or carriers) in other cases.

In all cases, the amount of attorneys fees payable to the claimants lawyer (either by the employer or the claimant) is subject to approval by the deputy commissioner, hearing examiner, board or court, as the case may be.

Disfigurements

The bill amends the definition of disfigurement to include head, face, neck, or other normally exposed areas of the body. This will provide compensation protection for many groups of workers who work at occupations in which appearance is a factor of employability.

Special Fund

The bill amends Section 44 of the Act (Section 8 of the bill) to improve the financing of the second injury fund. These proposals require payment to the second injury fund in death cases of $5,000, rather than $1,000, and in schedule award permanent partial cases where there are no survivors, the award is paid into the fund.

Half the cost of improved benefits for those injured prior to these amendments is to be paid from the special fund which will be financed by assessments from employers and half from Federal funds. An initial Federal appropriation of $2 million to be paid into the special fund will be repaid within five years.

H.R. 12006 also provides for the annual assessment of carriers to make certain the fund is maintained at a level judged to be adequate.

Extension of Coverage to Shoreside Areas

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close

to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	[1]77.00
New Jersey	101.00
New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

[1] Plus $6 for each dependent.

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern card-handling techniques, such as containerization and

the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would

purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Administrative Changes

H.R. 12006 amends Section 19(d) of the Act to make clear that all hearings under this Act are to be conducted in conformity with the Administrative Procedure Act (5 USC 554) by hearing examiners qualified under the Act. It is the committee's belief that the administration of the Longshoremen's and Harbor Workers' Compensation Act has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings. Moreover, with the new responsibilities that will devolve upon the Secretary with the passage of this bill it will be extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for purposes of the disputes brought under this statute.

It is also expected that the Secretary take full advantage of the requirement of separating the functions under

the statute to consider a complete reorganization of the present Bureau of Employee's Compensation insofar as it deals with the administration of this Act. It will also be incumbent upon the Secretary as part of this reorganization to revise the regulations under this Act which have not been amended for many years.

Time for Commencement of Action

The Act now requires a three day waiting period for benefits unless the disability exceeds 28 days. The bill reduces this period to 14 days. Most workmen's compensation laws contain provisions which establish a waiting period before the payment of a benefit is due. The reason for including a waiting period in the law is to conserve premium dollars that might be dissipated in paying benefits in minor injury cases, rather than the payment of adequate benefits in more serious cases of work injury. The waiting period, of course, also reduces the overall cost of the program. Reasonable waiting periods in workmen's compensation laws have not been seriously challenged. However, the retroactive period has aroused serious controversy. The retroactive period is the time specified in each law that an injured worker must be disabled in order to receive compensation for the waiting period.

The National Commission's recommended standard is for a waiting period of three days with retroactive benefits payable after two weeks or less and the committee followed that recommendation. Twenty-eight jurisdictions including many of the major industrial states, such as New York, New Jersey, and Michigan, have established

the retroactive period in their law at fourteen days or less.

Written Approval of Compromise Settlements

H.R. 12006 amends *Section 15(i)* to make clear what Congress intended by requiring "written approval" of the employer of compromise settlements in third-party cases in order to avoid discharging the employer from further liability under this Act. Some courts have held that employers or insurance carriers are estopped to deny they have given their written approval when in fact no such written approval was given. This amendment makes it clear precisely what written approval the person entitled to benefits must obtain and file with the deputy commissioner to constitute the written approval contemplated by this subsection of the Act.

Administrative and Judicial

Review. – Under present law review of decisions by deputy commissioners is through injunction proceedings in the district courts.

H.R. 12006 would amend the Act to provide an internal administrative review of initial decisions in contested cases by a three-man board within the Department of Labor.

The internal appeal authorized by H.R. 12006 is not a de novo proceeding or an unrestricted review. The findings of fact on which the initial award is based may only be set aside if they are not supported by substantial evidence in the record considered as a whole.

H.R. 12006 authorizes a judicial review of board decisions in the courts of appeals under the same "substantial evidence" test.

The Committee does not intend that the appellate process result in delay of payment of compensation. Initial awards are not to be stayed pending review proceedings except by specific order of the board or the court based on a finding that irreparable injury would otherwise result to the employer.

Assistance to Claimants

Section 39 of the Act is amended to substantially increase the Secretary's responsibility for administering this program so far as providing services to employees. The bill will require the Secretary upon request to provide assistance to persons covered under this act to understand the benefits and other matters relating to the operations of the statute and also to provide assistance in processing a claim. It is intended that this assistance be all inclusive and enable the employee to receive the maximum benefits due to him without having to rely on outside assistance other than that provided by the Secretary. The bill also makes legal assistance in processing the claim for benefits under this Act available in needy cases upon request subject to the Secretary's discretion. It is the committee's desire that the Secretary construe this provision as liberally as possible so as to provide any worker in need of legal assistance such counsel, especially where the employee is either indigent or of minimal means. It would also be appropriate for the Secretary to provide legal assistance in similar types of death cases as well as

to provide as much assistance in other cases of hardship or unusual types of proceedings or difficult cases.

H.R. 12006 also requires the Department of Labor to take a more active role in assuring that injured employees receive proper medical treatment and rehabilitation services. It is the Department's responsibility to take affirmative action in this area by actively supervising the medical care given to injured employees. This does not mean that the Department may tell doctors what to do, but it does mean that the Department should require periodic medical reports and take the initiative in contacting injured employees, especially in cases of serious injury to see that the employee is receiving proper care and that rehabilitation services are being provided, where required.

Free Choice of Physician

H.R. 12006 also gives an injured employee freedom to choose his own physician from among those designated as authorized physicians by the Secretary. Under present law, the employee is limited to a panel of physicians chosen by the employer and approved by the Secretary.

Medical Evaluation

H.R. 12006 also provides for a new procedure for obtaining impartial medical evaluations in contested cases. Either party may request an examination by a physician employed or selected by the Secretary and if either party is dissatisfied with the results of such examination may request a further examination by one or more

other physicians employed or selected by the Secretary. Physicians used to make such examinations may be full-time employees of the Department of Labor or outside physicians selected by him for specific cases.

The Committee intends that the extensions of coverage and the additional rights afforded to widowers will apply only to cases of deaths or injuries occurring on or after the effective date of these amendments.

Conclusion

Congress demonstrated a deep concern for providing adequate workmen's compensation protection for injured American workers when they amended the Federal Employees' Compensation Act in 1966. The objective of Congress in the matter of workmen's compensation is clear. It is to provide a modern workmen's compensation program for a substantial number of American workers and their families. The Daniels bill, H.R. 12006, as amended, accomplishes this result.

Section-by-Section Description of Committee Amendment to the Bill

section 1

This section provides that the Act may be cited as the "Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972".

section 2

Subsection (a) amends the definition of the term "employee" contained in section 2(3) of the Act. The

present definition merely excludes from the definition of "employee" a master or member of a crew, or any person engaged by the master to load, unload, or repair any small vessel. The new subsection retains this exclusion and states that the term includes any employee engaged in maritime employment, any longshoreman or other person engaged in longshoring operations, and any harborworker (including any ship repairman, shipbuilder, and shipbreaker).

Subsection (b) amends the definition of the term "employer" contained in section 2(4) of the Act. Under the amendment made by this subsection, the term "employer" means an employer of employees in maritime employment upon the navigable waters and on any dry dock, as under present law, and is extended to include an employer of such employees in such employment on any adjoining pier, wharf, terminal, building way, marine railway, or other adjoining area used in loading, unloading, repairing, or building a vessel.

Subsection (c) amends section 3(a) of the Act, which determines coverage in respect to disability or death of an employee. The amendment made by this subsection eliminates the requirement that, as a prerequisite for coverage, there be no valid recovery under State law, and broadens coverage to include cases where the injury occurs on any pier, wharf, terminal, building way, or marine railway adjoining navigable waters, or any other adjoining area used in loading, unloading, repairing, or building a vessel.

SECTION 3

Subsection (a) of this section adds a definition of the term "student" to section 2 of the Act. A student is a person studying full-time at a government-supported institution, an accredited institution or one whose credits are accepted upon transfer by at least three accredited schools. The age limit is twenty-three, or the age upon completion of four years of education beyond the high school level, whichever arrives first. There would be no loss of student status if there is no more than a five month break between school years or if the Secretary finds that factors beyond a person's control prevent continuation of his education for a longer period. A person serving in the armed forces would not be a student under the Act.

Subsection (b) amends the definition of the term "child" contained in section 2(14) of the Act so as to include persons who, though eighteen years of age or older, are students as defined in the definition added by the amendment made by subsection (a).

SECTION 4

This section changes section 6(a) of the Act so as to allow compensation from the date of the disability in cases where the injury results in disability of more than fourteen days, instead of the twenty-eight days under present law.

SECTION 5

Subsection (a) of this section substitutes for the weekly dollar maximum and minimum compensation for

disability under present law a new method for determining maximum and minimum compensation (to be applicable to persons currently receiving compensation as well as those newly awarded compensation) which is based on the national average weekly wage. Subsection (a) adds to section 6 of the Act new subsections which provide that –

> (1) compensation for disability shall not exceed specified increasing percentages (greater than 100) of the applicable national average weekly wage for the next three years, and shall not exceed 200 percent of the applicable national average weekly wage thereafter;
>
> (2) compensation for total disability shall not be less than 50 percent of the applicable national average weekly wage (but no greater than the employee's average weekly wages);
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> (3) prior to October 1 of each year, the Secretary of Labor shall determine the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year on the basis of data (for the three most recent calendar quarters prior to his determination) as to the average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls; and
>
> (4) maximum and minimum compensation for a nonappropriated fund instrumentality employee shall be $66^2/_3$ percent of the highest rate of basic pay in GS-12, and of the lowest rate of basic pay in GS-2, respectively.

Subsection (b) adds to the definitions in section 2 of the Act the definition of the term "national average weekly wage" as the national average weekly earnings of

production or nonsupervisory workers on private nonagricultural payrolls.

Subsection (c) amends section 8(d) of the Act to provide that in nonenumerated cases of permanent partial disability (which are not, under present law, included in the provision whereby the compensation to which the claimant would be entitled is paid to his survivors even where his death is not caused by the injury), the survivors of the claimant will be entitled to certain percentages of 1.5 times the weekly compensation of the deceased at the time of his death, even where his death is not caused by the injury, as is done in cases where the injury causes death under section 9 of the Act.

Subsection (c) continues the existing provisions (of section 8(d) of the Act) for payment of compensation to which claimants for permanent partial disability for enumerated injuries would have been entitled to their survivors, but the requirements that children be under the age of eighteen years and that the widower be dependent on his wife are eliminated. In addition, a provision is added that, if there is no surviving spouse or child, such compensation, which would be payable to other survivors listed in section 9(d) of the Act, using the appropriate percentages contained in that section, shall be payable to such other survivors. If the aggregate amount to which all such other survivors are entitled, as so determined, is less than such unpaid compensation, the excess shall be divided among such survivors according to the amount otherwise payable to each. If there are no survivors, such unpaid compensation shall be paid to the special fund established under section 44 of the Act.

Subsection (d) amends section 9 of the Act to provide for payment of compensation for survivors of employees who die while receiving compensation for permanent total disability, even though death is from other causes.

Subsection (e) of this section eliminates the limitation of $24,000 on the total money allowance payable to an employee as compensation for injury under the Act by repealing section 14(m) of the Act.

SECTION 6

This section amends section 7 of the Act, which pertains to medical services. Under present law, the employee has the right to choose a physician from a panel named by the employer and approved by the Secretary, and where it is necessary for the employee to obtain medical services from other physicians, he must notify the employer within 20 days following first treatment in order to make a valid claim against the employer for such services. Under the amendment made by this section, the employee may choose his own physician from among all those authorized by the Secretary, but if the employee is not able to choose, it is the duty of the employer to select a physician when immediate treatment is needed. The Secretary is directed, by the amendment made by this section, to take action to assure himself of the quality of medical care given to injured employees. Under this amendment, the employee must notify the employer within ten days after first treatment.

Present law authorizes the deputy commissioner to cause the examination of an employee by a physician of

his own choosing where he believes an examining physician has not been impartial, and to charge the cost of such reexamination to the employer or insurer. The amendment made by this section amplifies this authority by giving the Secretary the power to cause such examination when medical questions arise in any case, and, where any party is dissatisfied, there will be a review or reexamination by one or more different physicians employed or selected by the Secretary. The employee will be permitted to charge the costs of medical treatment to the employer if the employer fails to provide or authorize the required medical services upon request by an injured employee. No claim against an employer is valid unless within ten days of the first treatment the attending physician gives a report of the injuries and his treatment to the employer and to the Secretary, or the Secretary excuses failure to make a timely report in the interest of justice. The amendment further provides that no physician selected by the employer, carrier, or employee shall be present at such examination, and that their conclusions as to the nature, extent, or cause of the impairment shall not be available (unless so ordered for good cause by the Secretary) to the physician at such examination. Moreover, the amendment gives the employer or carrier the right to have the employee examined immediately after such examination upon the same premises, but in the presence of any physician which the employee may select. The examinations authorized by the amendment made by this section must be submitted to by the employee in order for compensation to be payable. Fees for medical services and examinations shall be limited to the prevailing rate in the community for similar treatment. The amendment made

by this section also adds a provision that physicians employed or selected by the Secretary for such examination or review may not have been paid in any way, in relation to a workmen's compensation claim, by an insurance carrier or self-insurer during the period of two years prior to such employment by the Secretary.

SECTION 7

This section amends paragraph (20) of section 8(c) of the Act, which directs that an award be made for serious facial or head disfigurement. Such an award cannot exceed $3,500. The amendment directs that such compensation shall be awarded also for serious disfigurement of the neck, or other normally exposed areas likely to handicap the employee in securing or maintaining employment.

SECTION 8

This section contains amendments to the special fund provisions contained in section 44 of the Act.

Subsection (b) changes the sum which the employer must pay into the special fund when an employee's death results from injury and there are no survivors entitled to compensation from $1,000, under present law, to $5,000. Subsection (b) also imposes upon carriers and self-insurers a new obligation, to contribute each year to the expenses of the special fund in accordance with a formula determined by the Secretary and based on the carrier or self-insurer's proportion of payments on risks covered by the Act in relation to the total of such payments made by

all carriers and self-insurers. Fines and penalties under the Act will continue to be paid into the special fund established in section 44 of the Act, as under present law. In addition, the amendment made by this subsection gives the Secretary the power, for the purpose of carrying out his duties in connection with the special fund, to investigate and gather data from each carrier and self-insurer, who is obliged to keep such records, and provide such information as the Secretary considers appropriate. The Secretary is given the power to subpoena witnesses and documents in connection with such investigations.

Subsection (c) adds a new subsection to section 44 of the Act, authorizing an appropriation to the Secretary of $2,000,000 for immediate deposit into the special fund, which shall be reimbursed to the Treasury over a five-year period.

Subsection (d) changes the uses to which the special fund may be put by adding to those payments which are already authorized under present law (e.g., additional compensation for injury increasing disability, maintenance and assistance for employees undergoing vocational rehabilitation, and payment for medical treatment where the employer defaults) to be made from the fund the following new categories of such payments:

> (1) payments for initial and subsequent annual adjustments in compensation for permanent total disabling injuries or deaths occurring prior to the date of enactment of the amendment made by subsection (d);

(2) reimbursement to the Treasury; and

(3) defraying the expenses of medical examinations caused by the Secretary under section 7 of the Act.

Unlike present law, under the amendment made by subsection (d) there is no priority of one category of authorized payments from the special funds over the other categories.

SECTION 9

This section amends section 8(f)(1) to provide that payment for injuries to an employee who had a permanent disability would be based on the average weekly wage of the employee at the time of injury. If an employee with a partial disability suffers a second injury and becomes totally and permanently disabled, but that total disability is not due solely to his second injury, the employer would pay compensation as provided for in the applicable schedule in section 8(c)(1)-(20) or up to 104 weeks, whichever is greater. In the case of injuries not described in section 8(c)(1)-(20) which cause total permanent disability or death to an employee already partially disabled, the employer would pay compensation payments or death benefits for 104 weeks only in addition to the benefits provided for in 8(b) and (e). In the case of a second injury with the provisions of section 8(c)(1)-(20) which causes permanent partial disability but where such partial disability is not due solely to that injury but is materially and substantially greater than the injury which would have resulted from the second injury alone, the employer would pay compensation provided for in section 8(c)(1)-(20) or 104 weeks, whichever is greater. In the

case of second injuries not described in section 8(c)(1)-(20) where such injuries cause permanent partial disability materially and substantially greater than that which would have resulted from the second injury alone, the employer would pay compensation for 104 weeks only in addition to compensation provided for under paragraphs (b) and (e) of section 8. In all cases arising under section 8(f), after expiration of the payments provided for in this section, the remainder of any compensation due would be paid out of the special fund provided for in section 44.

Section 9(b) strikes section 8(f)(2).

SECTION 10

This section amends section 9 (pertaining to compensation for death) of the Act.

Subsection (a) of this section increases the amount of reasonable funeral expenses payable from $400 to $1,000.

Subsection (b) of this section increases the death benefit payable to the survivor who stands in the place of the widow or widower from 35% of the deceased's average wages to 50% and the benefit payable for the support of each child from 15% of the deceased's average wages to 16⅔%. The maximum total amount payable, 66⅔% of such wages, under section 9 of the Act, is not changed by the amendment made by subsection (b).

Subsection (c) of this section amends section 9(d) of the Act by allowing death benefits to be paid for support of dependents (in addition to grandchildren, brothers and sisters, parents, and grandparents of the deceased as

authorized under present law) who satisfy the definition of "dependent" contained in section 152 of the Internal Revenue Code of 1954. In addition, section 9(d) of the Act is amended so as to increase the percentage of the wages of the deceased for the support of grandchildren, brothers and sisters, and those meeting the Internal Revenue Code definition from 15% to 20%. The share of parents and grandparents remains 25%.

Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the Act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased.

SECTION 11

This section adds 3 new subsections to section 10 (pertaining to determination of the average weekly wage of the injured employee) of the Act.

New subsection (f) directs that, effective October 1 of each year, compensation or benefits payable for permanent total disability or death where the injury occurred after the enactment of that subsection will be increased by the percentage of increase, if any, in the applicable national weekly wage over that of the previous year.

New subsection (g) provides that there shall be no reduction in compensation or death benefits, and that any

adjustment in compensation or benefits under new subsection (f) shall be fixed at the nearest dollar, in the amount of at least one dollar.

New subsection (h) provides for the adjustment of compensation or benefits for total permanent disability or death commencing or occurring prior to the enactment of that subsection. Such adjustment shall be arrived at, no later than 90 days after the enactment of that subsection, by assuming that the national average weekly wage is the employee's average weekly wage and that the injury or death occurred on the day after such enactment date. No employee or survivor shall receive less than that to which he was entitled on such enactment date. However, cases where such compensation or benefits were awarded at less than the maximum rate provided at the time of the injury, the adjustment shall be arrived at by assuming that the employee's average weekly wage is equal to what it was at the time of the injury increased by the percentage of increase in the national average weekly wage between the year of the injury and the first day of the first month following the enactment of that subsection. In cases where the injury occurred before 1947, the Secretary determines the amount the employee's average weekly wage shall be deemed to have increased for the pre-1947 period. New subsection (h) provides that half the adjustment made thereunder will be paid out of the special fund established in section 44 of the Act, and the remainder from appropriations. It also provides that the compensation and benefits which have been adjusted thereunder will continue to be adjusted each year under new subsections (f) and (g).

SECTION 12

This section amends section 12(a) (pertaining to the time period within which notice or injury or death must be given) and section 13(a) (pertaining to the time period for filing a claim for disability or death) of the Act to provide that the time periods referred to therein shall not begin to run until the employee or beneficiary is aware (or reasonably should be aware) of the relationship between the injury or death and the employment.

SECTION 13

This section amends the provisions pertaining to fees for services rendered in respect to claims or awards for compensation, contained in section 28 of the Act.

A new provision is added directing an award of a reasonable attorney's fee against an employer or carrier to be paid directly to the attorney in a lump sum, where such employer or carrier has declined to pay compensation within 30 days after notice that a claim has been filed on the ground of nonliability, and such claim is successful.

A new provision is added dealing with cases where payment of compensation is tendered and an unresolved controversy develops about the amount of additional compensation, despite the written recommendation of the deputy commissioner. The provision directs an award of a reasonable attorney's fee based solely on the difference between the amount tendered and the amount paid, where the employer or carrier has refused to accept the recommendation and the employee is later awarded an

amount greater than that tendered or paid by the employer or carrier. In cases where an independent medical report has been made under section 7(e) of the Act to resolve a controversy over length or degree of disability, such award may be assessed against the employer or carrier if the claimant is thereafter successful in review proceedings.

In all cases other than those specified above, attorneys' fees may not be assessed against the employer.

This section also amends the provisions of section 28(a) of the Act relating to approval of fees. Under the amendment, attorneys' fees for services for the claimant in review proceedings shall be approved, and, if so approved, may become a lien against the claimant's compensation where the deputy commissioner, Review Board (set up in the amendment made by section 15 below), or court fixes such lien. This differs from present law in that, thereunder, claims for legal services (or other services) are not valid unless approved, but if approved, shall become a lien upon the compensation.

The amendment made by this section adds a provision which authorizes reasonable and necessary costs of witnesses to be assessed against the employer or carrier in cases where an attorney's fee has been awarded against an employer or carrier, as determined by the deputy commissioner, Review Board, or court. Such award does not affect the compensation payable under the Act.

Under present law contained in section 28(b) of this Act, no fee may be received unless approved by the deputy commissioner or court. The amendment made by

this section adds the Review Board to the list of approving entities, prohibits the receipt of fees without such approval for services rendered as a representative of claimant, instead of for services rendered in respect to a claim or award for compensation, and provides criminal penalties for violations of this section.

SECTION 14

This section amends section 19(d) of the Act so that a hearing on a claim ordered by the deputy commissioner must be conducted by a hearing examiner qualified under section 3105 of title 5, United States Code, and in accordance with the adjudication provisions (section 554 of chapter 5) of title 5. Present law dictates only that employer and employee may present evidence and be represented.

SECTION 15

This section substitutes for section 21(b) (providing for review of compensation orders in Federal district court) of the Act two new subsections in order to set up a Benefits Review Board, to be appointed by the Secretary, which will have jurisdiction over decisions with respect to claims raising substantial questions of fact or law, and the authority to order stays of payment pending final decision in such proceedings. A stay will not be granted unless irreparable injury to the employer or carrier would otherwise ensue. The Board's findings of fact will be conclusive if supported by substantial evidence in the record considered as a whole. Review of final orders of the Board may be obtained by filing within 60 days in the

United States Court of Appeals for the circuit in which the injury occurred.

This section also amends section 33(g) (pertaining to liability of the employer in cases of compromise with third parties) of the Act. The present law holds the employer liable for an amount over the compensation paid to the employee by the third party, where the employee compromised with the third party for an amount less than that to which he would have been entitled under the Act, only if the employer consented in writing to the compromise. The amendment made to section 33(g) directs that such written approval be obtained both from the employer and his carrier, no later than the time of such compromise, on a form provided by the Secretary and filed within 30 days in the office of the appropriate deputy commissioner.

SECTION 16

This section amends section 21(a) of the Act. Under present law, it is the obligation of the United States attorney in the district where a case is pending to represent the Secretary or deputy commissioner in cases under the Act. Under the amendment made by this section, attorneys will be appointed by the Secretary to represent the Secretary, the deputy commissioner, a hearing officer, or the Board, except in proceedings in the Supreme Court.

SECTION 17

This section amends section 39(c) to require the Secretary, upon request, to provide assistance to persons

covered by the Act to aid them in understanding the Act's provisions and to assist them in processing a claim. The Secretary may, upon request, where circumstances warrant provide individuals with legal assistance in processing a claim under the Act. The Secretary would also be required to provide information on medical, manpower, and vocational rehabilitation services to employees receiving compensation under the Act and to assist them in obtaining such services.

SECTION 18

This section amends section 5, adding a new subsection (b) which provides that a person covered by the Act who is injured due to the negligence of a vessel may sue the vessel for damages. The employer, however, would not be liable, either directly or indirectly, for damages which the vessel was required to pay in such a lawsuit. The Act would declare void any indemnification action or contracts or warranties requiring payment by the employer to the vessel of any damages which the vessel was required to pay to an employee in such a lawsuit. If the employee was employed by the vessel to provide stevedoring services and his injury was caused by the negligence of other persons providing stevedoring services to the vessel, action against the vessel would be barred. Similarly, if the employee were employed by the vessel to provided shipbuilding or repair services and his injury were caused by the negligence of other persons providing such services to the vessel, such an action against the vessel would be barred. Actions under this section cannot be based on the doctrine of seaworthiness and actions provided for in this section would be the

exclusive remedy against a vessel. Vessel would be defined as any vessel upon which or in connection with which any person entitled to benefits suffers injury and including the vessel owner and others responsible for the operation of the vessel.

SECTION 19

This section adds a new section to the Act which covers cases of discrimination against an employee as to his employment because of having claimed or attempted to claim compensation from the employer or because of his testimony in a proceeding under the Act. Such discrimination is made unlawful and a penalty of not less than $100 nor more than $1,000 is to be paid into the special fund established in section 44. If not paid, such penalty is recoverable in a civil action in the appropriate U.S. District Court. Any employee so discriminated against shall be reinstated and entitled to any back pay, if lost because of such discrimination. The employer alone, and not his carrier, is liable for such penalties and payments. Any provision in an insurance policy to indemnify an employer for the liability for such penalties is void.

SECTION 20

This section amends section 8(i) by substituting new subsections 8(i)(A) and 8(i)(B).

Subsection 8(i)(A) provides that the deputy commissioner, Board, or Court may approve a settlement discharging an employer from liability for compensation if he deems it to be in the best interests of the employee. If

an employee dies from causes other than the injury, after a settlement has been reached and approved, the sum is still payable to the survivors as enumerated in subsection (d) of this section.

Subsection 8(i)(B) provides that the Secretary of Labor may approve a settlement covering payment of medical benefits. If the employee died after approval of such a settlement from causes other than the injury, the benefits would be paid to the survivors as enumerated in subsection (d) of this section.

Subsection (b) of this section amends section 17 by adding a new subsection (b), which states that if a trust fund created under section 302(c) of the National Labor Relations Act established under a collective bargaining agreement has paid an employee disability compensation which, pursuant to that agreement, must be paid back by the employee if he receives compensation under the Act, the Secretary may place a lien on the compensation due the employee under this Act in favor of the trust fund.

Subsection (c) of this section amends section 2 of the Act by consolidating the definitions of "widow" and "widower". The consolidated definition eliminates the distinctions between the respective definitions for surviving spouses, whereby husbands were included within the definition of "widower" only if they lived with, and were dependent for support upon their wives at the time of death, but whereby all wives living with their husbands (or apart, for justifiable cause) at the time of death, regardless of dependency, were included within the definition of "widow". The amendment made by this subsection extends the previous requirements for inclusion in

the category of "widow" to the category of "widower" as well.

Subsection (d) of this section amends section 9 of the Act by substituting the term "widow or widower" for the term "surviving wife or dependent husband", thereby making surviving husbands and wives equally eligible for survivor's benefits under the Act.

SECTION 21

This section makes a technical amendment to section 3(a)(1) of the Act.

SECTION 22

This section provides that the amendments made shall take effect 30 days after the date of the enactment of the amendments.

FILED
OCT 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-411

(2)

IN THE

Supreme Court of the United States

JOHN C. WISTROM,

Petitioner,

v.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA

Brief In Opposition To Petition For Writ Of Certiorari

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1989 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

20pp

QUESTIONS PRESENTED

1. Are railroad employees whose injuries are covered by the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, precluded from bringing an action under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.?*

2. Is an employee who repairs or maintains equipment used for ship loading engaged in "maritime employment" within the meaning of U.S.C. § 902(3)?

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IN THE

Supreme Court of the United States

No. 89-419

JOHN C. WISTROM,

Petitioner,

v.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA

Brief In Opposition To Petition For Writ Of Certiorari

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Minnesota Court of Appeals are indicated on the caption. Transtar, Inc. is the parent company of Respondent. Respondent has no subsidiaries. Its affiliates are as followers: Bessemer and Lake Erie Railroad Company; Birmingham Southern Railroad Company; Central Radio Telegraph Company; Cuyahoga Dock, Inc.; Elgin, Joliet & Eastern Railway Company; Fairfield Southern Company, Inc.; The Lake Terminal Railroad Company; McKeesport Connecting Railroad Company; Mobile River Terminal Company, Inc.; Mon Valley Railway Company; Pittsburgh & Conneaut Dock Company; Tracks Traffic and Management

Services Company; Union Railroad Company; USS Great Lakes Fleet, Inc.; and Warrior & Gulf Company.

The following companies hold the voting shares of Respondent's parent company, Transtar, Inc.: USX Corporation; Blackstone Capital Partners, L.P. and Blackstone Transportation Partners.

OPINION BELOW

Wistrom v. Duluth, Missabe and Iron Range Railway Company, 437 N.W.2d 727 (Minn. App. 1989), *review denied* May 24, 1989. The Order of the Minnesota Supreme Court denying review (A17), and the Decision of the trial court (A1-A7) were not reported.

JURISDICTION

The Minnesota Supreme Court denied further review of this case on May 24, 1989 (A17). Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3), and filed his original Petition for Certiorari on August 18, 1989. The Clerk refused to docket the Petition because of its failure to comply with the Supreme Court rules and a corrected Petition was mailed to attorneys for Respondent on September 6, 1989, and was received on September 8, 1989.

STATUTES INVOLVED

1. The Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*

2. Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.*

STATEMENT OF THE CASE

Petitioner claims to have been injured while working for Respondent as an ore dock electrician at its shiploading

and storage facility in Two Harbors, Minnesota (All). Respondent transports taconite pellets from the Minnesota Iron Range to the facility, which is located adjacent to Lake Superior (A10). Ore pellets are unloaded at the facility' strain unloading station and then discharged onto a conveyor system (*Id.*). The conveyor system can move the ore pellets directly to the docks for immediate loading onto ships or can route them to a storage area (A11). Ore pellets are removed from a conveyor by a mechanical stacker. When the pellets in storage are to be loaded on a ship, a bucket wheel reclaimer loads the pellets either into ore cars or onto the conveyor system for further transport to the docks (A11). Petitioner's job required him to perform electrical repair work on the ore dock and in the storage facility (*Id.*). He claims to have been injured while performing electrical maintenance work on the bucket wheel reclaimer referred to above.

Petitioner brought an action against Respondent seeking to recover for his injuries under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter "FELA"). The trial court granted Respondent's Motion for Summary Judgment, finding as a matter of law that the Petitioner was engaged in "maritime employment" within the meaning of 33 U.S.C. § 902(3) and that the exclusive remedy for the damages sought in the action was under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter "LHWCA") (A1-A5). The Minnesota Court of Appeals affirmed the trial court, *Johnson v. Duluth, Missabe and Iron Range Railway Company*, 437 N.W.2d 727 (Minn. App. 1989), and the Minnesota Supreme Court denied further review (A17).

SUMMARY OF ARGUMENT

If the LHWCA provides a remedy for a railroad employee's on-the-job injury, the employee cannot maintain an action under FELA. The legislative history of the LHWCA demonstrates that Congress intended that where railroad workers were provided a remedy under the LHWCA for on-the-job injuries, such workers should be precluded from maintaining an FELA action. As originally introduced, the bill specifically excluded railroad employees from its coverage, but that exclusion was eliminated when the bill was finally passed. In 1972, coverage under the LHWCA was expanded by extending coverage to certain areas adjoining the navigable waters. Despite the decisions of this Court dating back to 1930, Congress failed to include any provision excluding railroad employees from coverage under the Act. Although the lower courts consistently applied the expanded Act to railroad workers engaged in maritime employment in the specified areas adjoining the navigable waters of the United States after 1972, Congress again failed to exclude railroad workers when the Act was substantially amended in 1984. By eliminating an exclusion for railroad workers in the original Act and subsequently failing to insert such an exclusion in amendments specifically dealing with the jurisdictional issue, Congress has demonstrated its intent to include railroad workers engaged in maritime employment within the LHWCA and preclude them from bringing an FELA action.

Public policy supports the conclusion that railroad workers injured on the job while engaged in maritime employment should be covered under the LHWCA and precluded from bringing an FELA action. The LHWCA embodies

the principles of a modern workers' compensation system, while the FELA limits liability to situations where the employer is at fault. As a remedial act typical of modern workers' compensation statutes, the LHWCA is liberally construed in favor of coverage. In exchange for liability without regard to fault, benefits are limited to a statutory schedule and the employer's liability under the Act is exclusive. Thus, the public policy which supports the exclusive remedy provision contained in the LHWCA requires that employees who are covered under the LHWCA be precluded from maintaining an action under FELA.

Workers who repair and maintain equipment necessary for loading ships are engaged in maritime employment within the meaning of the LHWCA. The recognition that modern cargo-handling techniques have moved the work of many maritime employees landward was a principal purpose in extending coverage of the Act in 1972. Consistent with this remedial purpose, the term "maritime employment" must be construed to include those who repair and maintain equipment necessary to shiploading.

ARGUMENT

I.

EMPLOYEES WHOSE INJURIES ARE COVERED BY THE LHWCA CANNOT MAINTAIN AN FELA ACTION.

A. The Legislative History Of The Longshoremen and Harbor Workers' Compensation Act Demonstrates That Congress Intended It To Provide The Exclusive Remedy For Railroad Workers Whose Injuries Are Covered By The Act.

In *Southern Pacific Co. v. Jenson*, 244 U.S. 205 (1916), this Court held that neither the state workers' compensa-

tion statute nor the Federal Employers Liability Act applied to a railroad employee injured while loading a vessel. The state statute was held inapplicable because the matter fell exclusively within federal admiralty jurisdiction. An attempt to remedy maritime accidents under state workers' compensation laws was held unconstitutional in *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1923). When the bill which became the Longshoremen and Harbor Workers' Compensation Act in 1927 was pending in Congress,

> . . . The importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer, were distinctly recognized.

Noguieria v. New York, New Haven, Hartford R.R. Co., 281 U.S. 128, 136 (1930).

As originally passed by the Senate, the bill which became the LHWCA contained a provision excluding railroad employees injured while engaged in interstate or foreign commerce. Sen. Rep. No. 973 (69th Cong. — 1st Sess.). This exception was eliminated from the bill when finally passed. (*Id.*)

Relying on the elimination of the exclusion, the presence of other, specific exclusions, and the importance of the policy of providing compensation for on-the-job injuries without regard to the fault of the employer, this Court held in *Noguieria, supra,* that the LHWCA provided the exclusive remedy for a railroad worker injured on navigable waters of the United States.

In 1972, the LHWCA was significantly amended for

the first time since 1927. Prior to 1972, the LHWCA applied to injuries occurring on the navigable waters of the United States so long as the employer and employees engaged in maritime employment. *Pennsylvania R.R. Co. v. O'Rourke,* 344 U.S. 334 (1952). Persons injured on piers or in terminals adjoining the navigable waters were not covered by the Act and frequently were without any workers' compensation remedy. *Davis v. Department of Labor,* 317 U.S. 249 (1942).

Recognizing that many state workers' compensation acts provided inadequate amounts of compensation and that modern cargo handling techniques had moved the work of many maritime employees landward from the water's edge, coverage under the Act was substantially expanded. *See generally, Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 262-263. The term "navigable waters" was expanded to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area customarily used by an employer in loading, unloading or repairing a vessel." 33 U.S.C. § 903A. To narrow the class of persons within this expanded area who were entitled to benefits under the LHWCA, Congress restricted the definition of "employee" to "any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operation and any harbor worker, including a ship repairman, ship builder and ship breaker . . . ." 33 U.S.C. § 902(3).

After the expansion of the LHWCA's coverage in 1972, the lower federal courts have consistently held that railroad workers injured in the specified areas adjoining the navigable waters are precluded from bringing an FELA

action if they are engaged in maritime employment within the meaning of the LHWCA. *Price v. Norfolk & W. Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980); *Harmon v. Baltimore & Ohio R. Co.*, 560 F.Supp. 914 (1983), *aff'd.* 741 F.2d 1398 (D.C. Cir. 1984); *Vogelsang v. Western Maryland Ry. Co.*, 531 F.Supp. 11, *aff'd.* 670 F.2d 1347 (4th Cir. 1982).

Congress again amended the LHWCA in 1984. 98 Stat. 1639-1655, P.L. 98-426 (98th Con. — 2nd Sess.). Although a number of amendments were added to exclude certain types of employees from the definition of "employees engaged in maritime employment" contained in Section 902(3), no exclusion was enacted for railroad employees or for workers engaged in the repair or maintenance of shiploading equipment. *Id.*, § 2. According to the House Report, except for the exceptions specifically enacted, case law regarding coverage under the Act was to remain undisturbed:

> The Committee underscores that the exclusions from the definition of "employee" contained in the amendments to section 2(3) of the Act and the amendments to section 3 of the Act (discussed below) are intended to be narrowly construed. Except as specifically detailed in those amendments, it is the intention of the committee neither to expand nor to contract the current coverage of the Longshore Act. This Committee concurs with the view of the Senate Committee on Labor and Human Resources in this regard which stated "with the Committee making only limited changes to (these sections) of the Act, it is obvious that a large body of decisional law relative to traditional maritime employers and harbor workers remains undisturbed." (Senate Committee on Education

and Labor, Report to Accompany S38, Report No. 98-81, 98th Congress, 1st Session, page 26.)

House Report No. 98-570, Part 1, p. 5, 98th Cong. — 2nd Sess.

Congress cannot be presumed to have been unfamiliar with this Court's decisions in *Noguieria* and *O'Rourke* when it enacted the 1972 amendments substantially expanding coverage under the Act. Nor can it be presumed to have been unaware in 1984 of the Court of Appeals' decisions precluding an FELA action for railroad workers injured on land while engaged in maritime employment. When viewed against the back drop of these decisions, the failure of Congress to specifically exclude railroad workers from the Act while enacting amendments dealing with coverage under the Act sufficiently indicates the congressional intent that railroad workers who are injured while engaged in maritime employment within the meaning of the LHWCA are precluded from maintaining actions under FELA.

B. Public Policy Requires That Employees Whose Injuries Are Covered Under The LHWCA Be Precluded From Maintaining An FELA Action.

The LHWCA has all the characteristics of a modern workers' compensation system. The employee has a right of recovery which is impaired by neither the employee's contributory negligence nor the employer's lack of fault, if the employee's injury or disease arises out of and in the course of employment. U.S.C. § 903(a); 33 U.S.C. § 902. In exchange for compensation without regard to fault, the employee gives up the right to sue his employer in tort.

and the employer is assured of a fixed, exclusive liability in exchange. 33 U.S.C. § 905; 33 U.S.C. § 908; *see generally, Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84 (89-90) (N.D.Cal. 1978).

As with virtually all workers' compensation acts providing similar, reciprocal benefits for employer and employee, the Act provides that "the liability of an employer (under the Act) shall be exclusive and in place of all other liability of such employer to employee . . ." 33 U.S.C. § 905(a). Moreover, it is only when the employer fails to pay compensation under the Act that the employee can maintain a legal action. (*Id.*) In those circumstances, unlike FELA, the employer may not defend on the basis of the employee's contributory negligence. (*Id.*)

The Federal Employers Liability Act is based on principles entirely different from those which underlie the LHWCA. Under FELA, there can be no recovery unless the employer is at fault. 45 U.S.C. § 51. In addition, contributory negligence on the part of the employee reduces any award. 45 U.S.C. § 53.

The policy of the LHWCA is to provide certain, but fixed, remedies for on-the-job injuries. The advantages of providing appropriate compensation without regard to the fault of the employer have been distinctly recognized by Congress and this Court. *Noguieria, supra,* at 136. The Act itself recognizes that a certain remedy for the employee in exchange for a limitation of liability for the employer is a more appropriate basis for dealing with maritime injuries than under liability acts. The policies inherent in the LHWCA preclude the implication of such an additional remedy against the employer.

II.

WORKERS ENGAGED IN THE REPAIR AND MAINTENANCE OF EQUIPMENT NECESSARY TO SHIPLOADING ARE ENGAGED IN MARITIME EMPLOYMENT WITHIN THE MEANING OF THE LHWCA.

Petitioner concedes that the "situs" requirement for coverage of the LHWCA is satisfied. The occupational or "status" requirement is also satisfied. Because Petitioner's job required him to repair and maintain equipment necessary for shiploading, he was thus engaged within maritime employment within the meaning of 33 U.S.C. § 902(3). The focus of this definition is on the nature of the worker's activity.

> This section defines the Act's occupation requirements. The term "maritime employment" refers to the nature of a worker's activities. Thus section 2(3) uses the phrase "longshoremen or other workers engaged in longshoring operations" as one example of workers who engage in maritime employment no matter where they do their job.

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 78 (1979). Workers responsible for some portion of the land to ship movement of cargo are engaged in "maritime employment."

> Persons moving cargo from ship to land transportation are engaged in maritime employment. A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.

P.C. Pfeiffer v. Ford, supra, at 82-83. Moreover, the statute and the 1972 amendments are to be liberally construed in

favor of coverage under t[illegible] Act. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. [illegible]9, 268 (1977).

In extending coverage of the LHWCA in 1972, Congress recognized that the advent of modern technology had changed the nature of maritime employment. As a consequence of this policy underlying the extension of coverage landward, the federal courts have uniformly held that the repair and maintenance of equipment necessary to shiploading is maritime employment within the meaning of the Act. *See generally, Sealand Services, Inc. v. Director ETC*, 685 F.2d 1121, 1123 (9th Cir. 1982); *Harmon v. Baltimore & Ohio R.R.*, 560 F.Supp. 914, *aff'd* 741 F.2d 1398 (D.C. Cir. 1984).

Petitioner asserts that a more restrictive test for coverage was adopted by this Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). In that case, the Court specifically noted that the claimant's work had nothing to do with the loading or unloading process. *Id.* at 425. In referring to the LHWCA, the Court noted that:

> Its purpose was to cover those workers on the situs who are involved in the essential elements of loading or unloading.

Id. at 423. The context makes it clear that the language merely indicates that involvement with the overall process of loading or unloading is essential, not that occupations less immediately necessary to the loading or unloading process are not covered by the Act.

The maintenance and repair of the sophisticated machinery necessary to load bulk cargo onto vessels at Respondent's shiploading facility is an integral part of the loading process. The development of such modern cargo handling

technology was itself one of the principal reasons for the expansion of coverage under the LHWCA in 1972. Since Petitioner's work in maintaining and repairing this technology was a necessary part of the process of loading vessels, he was engaged in maritime employment within the meaning of the Act.

CONCLUSION

Petitioner's regular employment involved the repair and maintenance of equipment necessary to Respondent's ship-loading operations. He was therefore engaged in maritime employment within the LHWCA in an area used by Respondent for loading vessels. The LHWCA therefore provides coverage for his claimed on-the-job injury and the exclusive liability of his employer. Therefore, Petitioner cannot maintain an action under FELA.

Respectfully submitted,

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